Supreme Court, U.S.
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No. 96-1216

In The

Supreme Court of the United States

October Term, 1996

JANE PHILLIPS EPISCOPAL MEMORIAL MEDICAL CENTER, JANE PHILLIPS EPISCOPAL HOSPITAL, INC., f/k/a Jane G. Phillips Memorial Hospital, Inc. d/b/a Oklahoma Medical Collection Services, and CHARLES WELLSHEAR, M.D.,

Petitioners,

v.

MAX LEE RISHELL, Curator of the Person and Estate of KATHLEEN LACEY, an incapacitated person,

Respondent.

On Petition For Writ Of Certiorari To the United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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LIST OF INTERESTED PARTIES

Since the filing of the petition, Petitioners Jane Phillips Episcopal Memorial Medical Center, Jane Phillips Episcopal Hospital, Inc., f/k/a Jane G. Phillips Memorial Hospital, Inc. d/b/a Oklahoma Medical Collection Services (Hospital Entities) have entered into a settlement with Respondent Max Rishell, Curator of the Person and Estate of Kathleen Lacey. As a part of the settlement, all claims against Hospital Entities are to be dismissed and Hospital Entities will withdraw from further participation in the petition. Counsel for Respondent is advised Petitioners' counsel of record, Stephen J. Rodolf, will submit to this Court documents confirming the settlement and the withdrawal of himself, his firm, Barkley & Rodolf, and his clients, Hospital Entities, from the petition as soon as the district court signs the order dismissing the claims against Hospital Entities.

The remaining parties to the petition are Charles Wellshear, M.D., sole remaining Petitioner, and Max Lee Rishell, Curator of the Person and Estate of Kathleen Lacey, Respondent.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent requests the Court deny the petition for writ of certiorari seeking review of two decisions of the United States Court of Appeals for the Tenth Circuit, *Rishell v. Jane Phillips Memorial Medical Center,* 12 F.3d 171 (10th Cir. 1993) (*Rishell I*), and *Rishell v. Jane Phillips Memorial Medical Center,* 94 F.3d 1407 (10th Cir. 1996) (*Rishell II*). Citations to the opinions will be to the opinions attached in the Appendix of the petition.

STATEMENT OF JURISDICTION

This Court cannot properly exercise jurisdiction over the part of the petition relating to *Rishell I* pursuant to 28 U.S.C. § 2101(c). This Court has discretionary jurisdiction to review *Rishell II* pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The petition seeks review of two decisions, *Rishell I* and *Rishell II,* which were separate decisions of the Tenth Circuit on two different issues. In *Rishell I,* the appeals court addressed the issue of diversity of citizenship. In *Rishell II,* the appeals court was asked to determine the appropriateness of the lower court's dismissal based on lack of indispensable parties pursuant to Rule 19, Federal Rules of Civil Procedure. The diversity issue was not revisited in *Rishell II.* What the petition does not make clear is that no petition for writ of certiorari was filed following the opinion in *Rishell I,* which was entered on

December 21, 1993. The petition also fails to make clear that Petitioner Wellshear, now the only petitioner, was not a party to the action at the time of the *Rishell I* opinion. The issues of timeliness and standing were known to Petitioners at the time the petition was filed, yet the petition ignores these jurisdictional issues entirely.

The petition seeks review of *Rishell II* on the basis of a supposed conflict in the circuits. As will be demonstrated below, there is no genuine conflict. The two circuit opinions relied on in the petition each applied the same rules and considerations to two different sets of facts. Moreover, the decision in *Rishell II* is consistent with previous decisions of this Court regarding the scope of Fed. R. Civ. 19.

The petition fails to demonstrate why this Court should grant the writ in this case.

A. Statement of the Facts.

On November 21, 1990, Kathleen Lacey was hospitalized in the psychiatric unit of Jane Phillips Episcopal Hospital (Hospital) in Bartlesville, Oklahoma for treatment of suicidal ideations and depression caused by schizophrenia. She was admitted by Dr. Charles Wellshear (Wellshear) who was in charge of her care.

On November 22, 1990, Mrs. Lacey attempted to hang herself in her hospital room. As a result, she suffered severe anoxic brain injury and presently exists in a permanent vegetative state.

After her injury, Mrs. Lacey remained hospitalized in Hospital until February 14, 1991, when she was transferred to a rehabilitation hospital in Dallas, Texas where she remained until June 7, 1991. She was then transferred to a permanent, long-term care facility in Slidell, Louisiana where she continues to reside. On December 27, 1991, Max Lee Rishell was appointed Curator of Mrs. Lacey.

B. Course of Proceedings and Disposition of the Case Below.

This action was originally filed February 6, 1992, in the United States District Court for the Western District of Oklahoma, against Hospital. Hospital responded with a Motion to Dismiss asserting lack of jurisdiction and improper venue. On June 5, 1992, the district court granted dismissal finding lack of jurisdiction. The Tenth Circuit opinion in *Rishell I*, dated December 21, 1993, reversed the trial court and remanded for further consideration of the jurisdiction issue. The date of entry of the Tenth Circuit opinion was December 21, 1993. No petition for writ of certiorari was filed within 90 days of that date. In fact, no petition for writ of certiorari regarding the decision in *Rishell I* was filed until the current petition, filed January 29, 1997.

Following remand, Wellshear was added as a party defendant and both Hospital and Wellshear filed motions for dismissal, asking the district court to: (1) dismiss for want of jurisdiction after reconsidering the facts in light of *Rishell I*; and (2) dismiss for lack of indispensable parties, pursuant to Fed. R. Civ. 19. In addition, the defendants asked the district court to transfer the case to

the Northern District of Oklahoma. Without ruling on the jurisdictional issues, the district court of the Western District transferred the case to the Northern District. Thereafter, on September 14, 1994, the district court for the Northern District entered an order finding: (1) Mrs. Lacey was domiciled in Louisiana thus finding diversity jurisdiction to exist; and (2) the case should be dismissed for want of indispensable parties.

Respondent appealed the district court's decision to dismiss for lack of indispensable parties. No cross-appeal of the court's finding of diversity jurisdiction was taken. Following the decision in *Rishell II*, Hospital and Wellshear sought rehearing and suggested an *en banc* rehearing. Both were denied on October 31, 1996.

Following the remand of the case back to the Northern District, the case was transferred by U.S. District Judge John R. Brett to U.S. District Judge Sven Holmes, who held a status hearing, established pertinent dates and set a trial date of May 19, 1997. Acting pursuant to the court's schedule, the parties completed discovery on February 3, 1997. On February 6, 1997, a mediation was held which resulted in a complete settlement of all claims against Hospital by Respondent and Mrs. Lacey's husband and children. No settlement was reached with Wellshear and that portion of the case remains set for trial on May 19, 1997.

At the status hearing, the court was advised a Motion for Stay had been filed the previous day based on representations the petition would be filed. The matter was briefed to the court. The parties continued to adhere to

the schedule established by court and no stay has been entered.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS NO JURISDICTION TO CONSIDER *RISHELL I.*

A petition for a writ of certiorari must be filed within 90 days of the entry of the judgment below. 28 U.S.C. § 2101(c). This 90-day limit is a congressional mandate which restricts this Court's "authority to extend the period for filing except as Congress permits." *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990). Even missing the filing period by only one day will deny this Court jurisdiction. *Deal v. Cincinnati Board of Education*, 402 U.S. 962 (1971). The 90-day period begins to run when the Court of Appeals enters its final judgment or decree, not with the date the district enters its judgment under mandate from the appellate court. *Boylan v. United States*, 257 U.S. 614 (1921), *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942).

At the time of the entry of *Rishell I*, Wellshear was not a party to the litigation and thus had no standing to appeal *Rishell I*. Hospital had standing to appeal, but did not do so timely. With the withdrawal of Hospital from the petition, there is no petitioner left with standing to seek review of *Rishell I*. Clearly, Wellshear lacks standing to challenge *Rishell I*.

Wellshear had standing to appeal the district court decision following remand that diversity jurisdiction existed, but he did not do so. Not only did Wellshear fail to take his own appeal of that decision, he failed to cross-appeal when Respondent appealed the Rule 19 dismissal entered in the same order.

The fact the writ was timely filed following denial of rehearing in *Rishell II* is of no benefit to Wellshear. The decision in *Rishell II* did not modify, clarify or any way affect the prior decision in *Rishell I*.

Finally, it should be noted that even if this Court had jurisdiction, the petition would not be certworthy. In *Long v. Sassar*, 91 F.3d 645 (4th Cir. 1996), the case cited in the petition as creating a conflict in the circuits, the Fourth Circuit felt bound to adhere to its previous decision in *Foster v. Carlin*, 200 F.2d 943 (4th Cir. 1952). The Tenth Circuit, however, found its own precedent, *Coppedge v. Clinton*, 72 F.2d 531 (10th Cir. 1934) to be less rigid. In *Rishell I*, the Tenth Circuit found the general rule an incompetent person presumptively lacks the capacity to change domicile is not immutable. (App. 39). This conclusion had been reached by other courts cited in *Rishell I* (App. 39-41). Moreover, the Third Circuit, in *Juvelis by Juvelis v. Snider*, 68 F.3d 648 (3rd Cir. 1995), cited *Rishell I* in concluding a profoundly retarded person could change domicile. In *Rishell I* the Tenth Circuit merely remanded the case for further consideration by the district court. After reviewing all the facts, the district court found diversity jurisdiction. That finding is unchallenged to this day.

II.

THERE IS NO GENUINE CONFLICT AMONG THE CIRCUITS WARRANTING THIS COURT'S REVIEW.

The petition asserts *Rishell II* is in conflict with *Aguilar v. Los Angeles County*, 751 F.2d 1089 (9th Cir. 1985). However, in each case, the respective courts applied the same provisions of Fed. R. Civ. 19 to different sets of facts and reached conclusions based on those facts. While the *Rishell II* opinion does find the dissent in *Aguilar* more persuasive and in keeping with the weight of authority (App. 8, n.3), the decision does not turn on that analysis. Instead, *Rishell II* found the district court's reliance for dismissal primarily on the fourth factor of Rule 19(b) (whether there will be an adequate remedy available if the action is dismissed) to be misplaced. *Rishell II* found the fourth factor should not have been perceived as dispositive. The court found the first and third factors (the extent a judgment rendered in the person's absence might be prejudicial to the person already a party, and whether a judgment rendered in the person's absence will be adequate) to be in Respondent's favor, and the second factor (extent prejudice can be lessened or avoided) to be of no real concern under the present facts. The court, relying on several cases, found the fourth factor insufficient alone to justify dismissal. The court noted Respondent has an interest recognized by federal law to be in the forum of his choice and that interest was not outweighed by the interests of "the absent parties, defendants, or the judicial system." (App. 12).

The court in *Rishell II* followed a previous Tenth Circuit opinion, *Francis Oil & Gas v. Exxon Corporation*,

661 F.2d 873 (10th Cir. 1981) in which the court said the four factors "are not to be applied in any mechanical way," concluding instead, "they be determined in a practical and pragmatic but equitable manner," citing *Schutten v. Shell Oil Co.*, 421 F.2d 869, 874 (5th Cir. 1970) and *Provident Tradesmens Bank and Trust Co. v. Patterson*, 390 U.S. 102 (1968). That is precisely what the Tenth Circuit did in *Rishell II*. No conflict exists.

Even if there were a conflict, for determining the certworthiness of a petition, a conflict alone will not necessarily warrant the granting of a writ. See, e.g. *Beaulieu v. United States*, 497 U.S. 1038 (1990), in which Justice White, dissenting from a denial of certiorari, noted that during the 1990 Term, he had dissented from denial of certiorari on 48 occasions because in his view there were conflicts among the circuits "sufficiently crystallized" to warrant certiorari. *Id.* at 1039. Despite these conflicts, this Court denied all 48 writ petitions.

Finally, the petition fails to demonstrate an "important matter" warranting review. Rule 10, Rules of the Supreme Court. As noted in *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74, this Court "does not sit to satisfy a scholarly interest" in an issue. Nor does it sit "for the benefit of the particular litigants." " 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic." The number of times the issue of Rule 19 dismissals has reached the Courts of Appeals is relatively rare. Even if there were a conflict among the circuits, it would not be beyond the academic or episodic. It would not qualify as an important matter warranting this Court's consideration.

III.

THE DECISION IN *RISHELL II* IS IN KEEPING WITH THIS COURT'S DECISION IN *PROVIDENT TRADESMENS*.

The petition suggests the decision in *Rishell II* is at odds with this Court's decision in *Provident Tradesmens Bank and Trust Co. v. Patterson*, 390 U.S. 102 (1968). In fact, *Rishell II* is entirely consistent with that decision. In *Provident Tradesmens*, this Court concluded the inflexible approach adopted by the Third Circuit in its Rule 19 analysis "exemplifies the kind of reasoning that the Rule was designed to avoid," *Id.* at 107, and reversed the circuit court's decision to dismiss. This court, focusing on the "equity and good conscience" test of Rule 19(b) "would doubtless have led to a contrary result below." *Id.* at 116. This Court likewise acknowledged different cases have varying factors which must be balanced. *Id.* at 119. The *Rishell II* court applied the "equity and good conscience" test and correctly concluded Respondent's action should not have been dismissed. That conclusion does not warrant review by this Court.

CONCLUSION

The petition is not certworthy. Its attempt to revisit *Rishell I* is untimely, leaving this Court with no jurisdiction to review it. Its assertion *Rishell II* creates a conflict among the circuits is incorrect, as is its claim *Rishell II* conflicts with *Provident Tradesmens*. The burden is on a petitioner to demonstrate why this Court should review a particular case. The present petition fails to meet that

burden. Respondent respectfully requests the petition be denied.

Respectfully submitted,

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